UNREPORTED

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.768 OF 1995

IN

SUIT NO.442 OF 1977

The Board of Trustees of the Port of Bombay, A body Corporate constituted under the provisions of the Major Port Trusts Act, 1963 as amended by the Major Port Trusts (Amendment) Act 1974, having its principal place of business at "Vijay Deep", Shoorji Vallabhdas Marg, Bombay - 400 038.	)	..Appellant/ Original 1st Deft.

V/s.

1) The Mahindra Ugine Steel Company Ltd. a public limited Company incorporated under the Companies Act, 1956 and having their registered office at Bakatwar Nariman Point, Bombay - 400 021.	)	
2) The New India Assurance Co. Ltd. a company incorporated under the Companies Act, 1956 and having its registered office at New India Assurance Building, 87, M.G. Road, Bombay- 400 023.	)	
3) The Oriental Fire & General Insurance Co. Ltd. a company incorporated under the Companies Act, 1956 and a subsidiary of the General Insurance Corporation of India, having their registered office at Jeeven Udyog Asfali Road New Delhi-2 and having Western Regional Office, D.O. No. 2, at Oriental House, Sir J. Tata Road, Bombay-2.	)	

4) United India Fire & General)
Insurance Company Ltd. a company)
incorpoted under the Company Act,)
1956 and a subsidiary of the)
General Insurance Corporation of)
India having their registered)
office at 151, Mount Road, Madras)
2 and Divisional Office D.O.7 Dr.)
D.N. Road, Bombay - 400 001)
)
)
5) The Scindia Steam Navigation Co.)
Ltd., a company incorporated under)
the Indian Companies Act, 1913 and)
having their registered office at)
Scindia House, Shoorji Vallabhdas)
Marg, Bombay - 400 038.)
)
)
6) The Eastern Buankerers Ltd., a)
Public Limited Company registered)
under the Companies Act and having)..Respondents/
their registered office at Scindia) Orig. Plffs.
House, Shoorji Vallabhdas Marg,) & Orig Defts
Bombay - 400 038.) Nos.2 & 3.

Mr.U.J. Makhija, Advocate with Mr. Gandhi i/b. Mulla Mulla for the appellant.

Mr.S.P.Kanuga, Advocate with Ms.Sneha Dwivedi for respondent Nos.1 to 4.

CORAM : R.M.LODHA AND J.P.DEVADHAR, JJ.

DATED : 18TH AUGUST, 2004.

ORAL JUDGMENT (PER J.P. DEVADHAR, J.)

. Whether the Port Trust can be held liable for the damage caused to the goods which were within its charge, even though the importer had abandoned the

said goods under section 23 of the Customs Act 1962 is the main question raised in this appeal.

2. In this appeal the Bombay Port Trust has challenged the Judgment and Decree passed by the learned Single Judge on 6/4/1995 in Suit No.442 of 1977. The appellant Bombay Port Trust is established under the Major Port Trust Act, 1963 (hereinafter referred to as the ‘defendant No.1’ for the sake of convenience). Mahindra Ugine Steel Co. Ltd., the respondent No.1 herein is engaged in the manufacture of steel (‘plaintiff No.1’ for the sake of convenience). The respondent Nos.2 to 4 are the Insurance companies who had covered the risk of various goods belonging to or imported by the Plaintiff No.1 (‘plaintiff Nos.2 to 4’ for the sake of convenience). The respondent No.5 (‘the defendant No.2’ for the sake of convenience) is a shipping company whose ship "Jalagouri" had carried the goods belonging to plaintiff No.1 into India. Respondent No.6 (‘the defendant No.3’ for the sake of convenience) is a company which was engaged to load and unload the cargo from the vessel "Jalagouri".

3. It is the case of the plaintiff No.1 that as per the contract dated 11th November, 1974 entered into by and between the plaintiff No.1 and a foreign

supplier in Sweden for import of automatic billet grinding machines and other auxiliary items at an aggregate value of Rs.70,32,222/- CIF, the said foreign supplier packed the machinery and auxiliary items in 65 cases and loaded the same on board vessel "Jalagouri" belonging to the defendant No.2. It is not in dispute that the entire amount as per the contract has been paid by the plaintiff No.1 to the said foreign supplier. The said vessel arrived at Bombay on or about 21st August, 1976. On 24th August, 1976 all the above 65 cases were discharged from the said vessel and the defendant No.1 took charge of the same. The defendant No.1 being the bailee of goods under section 43 of the Major Port Trusts Act 1963 was responsible for the loss, destruction or deterioration of goods of which it had taken charge.

4. After taking charge, while transporting the said goods to the off-loading point within the port premises where the unloaded cargo are stored, one out of the 65 cases bearing case No.28 accidentally slipped from the trolley and ultimately fell into the sea. The said case bearing No.28 weighing 7.5 tons (gross) could be retrieved from the sea only on 26th August, 1976.

5. As a result of the said accident, the

machinery and auxiliary items contained in the said case No.28 were broken and being in water for two days the said machinery became totally damaged. In the meantime, the plaintiff No.1 had paid the entire customs duty payable on the machinery and auxiliary items contained in all the 65 cases. On coming to know about the accident, the plaintiff No.1 by a letter dated 30th August, 1976 called upon the defendant No.1 Port Trust to furnish a detailed report as to how the extensive damage was caused to the said goods and also called upon the Port Trust to arrange for survey of the damage caused to the goods. The plaintiff No.1 instructed their clearing agents to obtain clearance of only 64 cases and as regards the damaged goods the plaintiff No.1 wanted to avail the facility of duty abatement/remission under section 22 and/or 23 of the Customs Act in case the loss was substantial. Accordingly, 64 out of the 65 cases were cleared and the plaintiff No.1 declined to take delivery of one case bearing No.28 because of extensive damage caused to it. By another letter dated 30th August, 1976 the plaintiff No.1 requested the defendant No.2 (Shipping Co.) to register their claim provisionally on the basis of the estimated loss caused to the said case No.28. By a letter dated 4th October, 1976 the defendant No.2 declined to register the claim of the plaintiff No.1 on

the ground that the goods were not landed under the qualified receipt issued by the BPT. Thus, according to the defendant No.2 any liability for the damage caused to the goods after discharge from the vessel would be solely on the defendant No.1.

6. By a letter dated 24th November, 1976, the plaintiff No.1 claimed a sum of Rs.13,24,040/- from the defendant No.1 being the loss caused to the plaintiff No.1 due to the gross negligence and failure to take proper care of the imported goods while in the custody of the defendant No.1. On carrying out joint survey with the Surveyors of the defendant No.1, defendant No.2 and B.P.T. Engineer, M/s.J.B.Boda Marine & General Survey Agencies Pvt. Ltd., Bombay submitted a report on 25/10/1976 stating therein that the machines contained in the case No.28 were damaged beyond repairs and the same could not be used for its original intended purpose. On 17th February, 1977 the plaintiff No.1 addressed a letter to the defendant No.1 demanding Rs.13,24,040/- from the defendant No.1 with interest at the rate of 12% p.a. from the date of the accident and costs. The defendant No.1 however, did not respond to the aforesaid letters.

7. In these circumstances, on 21st March, 1977

the plaintiff No.1 filed the aforesaid suit in the High Court at Bombay against the defendant No.1, the Shipping Company and also the Insurers, seeking a decree in the sum of Rs.14,03,480/- with interest on Rs.13,24,040/- at the rate of 12% p.a. from the date of the suit till payment.

8. After the above suit was filed, the Insurance companies paid to the plaintiff No.1 a sum of Rs.13,26,089.26 being the amount payable in respect of the damaged goods under the insurance policies taken out by the plaintiff No.1. On such payment being made, the Insurance companies on the principle of subrogation became entitled to claim the aforesaid amount of Rs.13,26,089.26 paid by them to the plaintiff No.1 and accordingly claimed that the said Insurance companies originally joined as the defendant Nos.4, 5 and 6 be transposed as plaintiffs in the suit. By an order dated 27th July, 1992 the Insurance companies were transposed as plaintiff Nos.2, 3 and 4 in the aforesaid suit filed by the plaintiff No.1.

9. The defendant No.1 in its written statement while denying its liability to pay any amount admitted that on 24th August, 1976 it had taken charge of the 65 cases belonging to the plaintiff No.1. It was stated

that one of the 65 cases bearing case No.28 was placed on a four wheel trolley and the same was towed by a tractor belonging to defendant No.1 towards the off-loading point in the dock and while it was being so towed one of the wheels of the said trolley accidentally slipped and got entangled in the rail track on the wharf, with the result the said trolley turned sideways and the edge of the said case dashed against the channel of the stationary wharf crane and the said case toppled down by the said impact and fell into the Dock Basin. It was stated that the falling down of the said case into the Dock Basin was purely a freak accident which occurred without any fault or neglect on the part of the defendant No.1 or their servants and employees. While admitting that the case was badly damaged, it was denied that the same was beyond repairs, as stated in the survey report. It was further stated that the said case No.28 was offered for delivery to the plaintiff No.1 in the condition in which it was when retrieved from the sea, but the plaintiffs delayed taking delivery thereof for over three weeks and allowed the contents to be rusted and get water jammed. It was further stated that under Section 43 of the Major Port Trusts Act the liability of the defendant No.1 was limited and as reasonable care has been taken by the defendant No.1, no liability

can be fastened on the defendant No.1 for the damage caused to the goods due to the freak accident.

10. On the above pleadings issues were framed and evidence was led by both the parties. After hearing counsel on both sides the learned Single Judge by the impugned Judgment held that the plaintiff No.1 was the owner of the said goods. The learned Single Judge held that under section 23(2) of the Customs Act the right to relinquish the title to the goods is vested with the owner thereof and the fact that the plaintiff No.1 has abandoned the goods establishes that the plaintiff No.1 was the owner of the goods. As the insurance companies had paid to the plaintiff No.1 the insurance claim amount, the insurance companies transposed as plaintiff Nos.2, 3 & 4 were entitled to claim the said amount from the defendant No.1. It was held that the defendant No.1 was statutorily obliged to take care of the goods which were in their charge. On appreciation of evidence, the learned Single Judge held that there has been negligence on the part of the defendant No.1 to take due care of the goods which were in their charge. Accordingly, the learned Single Judge decreed the suit in favour of plaintiff Nos.2 3 & 4 and against the defendant No.1 with interest thereon at the rate of 6% per annum from the date of the suit till

payment. The 1st defendants were also ordered to pay the costs of the suit to plaintiff Nos.2, 3 & 4 in one set. Being aggrieved by the aforesaid Judgment, the defendant No.1 has filed the present appeal.

11. Mr.Makhija, learned advocate appearing on behalf of the Port Trust broadly submitted as follows:-

a) By abandoning the goods under section 23 of the Customs Act 1962, the plaintiff No.1 relinquished right, title and interest in the goods and on relinquishment of title to the goods, the plaintiff No.1 could not claim any amount from the defendant No.1. Consequently, the plaintiff Nos.2, 3 and 4 (insurance companies) who stepped into the shoes of the plaintiff No.1 had no right to claim any amount from the defendant No.1.

b) The defendant No.1 had taken all reasonable care and there was no negligence or failure on the part of defendant No.1 to take proper care of the imported goods and the damage caused to

the case No.28 was due to freak accident for which the defendant No.1 could not be held liable.

c) Assuming that the defendant No.1 was liable, then, it could be to the extent of the value of the goods contained in the packing list originally submitted by the plaintiff No.1 and not as per the value contained in the revised packing list.

12. Elaborating his arguments Mr.Makhija submitted that section 23 of the Customs Act 1962 deals with the remission of duty on lost, destroyed or abandoned goods. He submitted that section 23 (1) of the Customs Act deals with remission of duty paid on goods which are lost or destroyed before clearance. Section 23 (2) of the Act deals with the abandonment of goods by relinquishing title in the goods, in which case the owner is not liable to pay duty on the said goods. He submitted that in the present case, the plaintiff No.1 had abandoned the goods as is evident from the orders passed by the customs authorities while granting refund of customs duty paid on case No.28. He submitted that on abandonment there is relinquishment of title and on relinquishment of title the plaintiff No.1 could not claim any amount in

respect thereof. Since the plaintiff No.1 could not claim any amount the plaintiff Nos.2, 3 & 4 who have stepped into the shoes of the plaintiff No.1 are also not entitled to claim any amount from the defendant No.1.

13. The counsel for the defendant No.1 further submitted that all the reasonable care for safe custody of the goods were taken by the Port Trust and as the damage was caused due to the freak accident, the defendant No.1 cannot be made liable to pay for the goods. He submitted that the goods which accidently fell into the sea were retrieved as early as possible and immediately thereafter the delivery of the goods was offered to the plaintiff No.1. However, the plaintiff No.1 did not take delivery of the goods and insisted on survey report. As a result of the delay on the part of the plaintiff No.1 in taking delivery of the machinery contained in case No.28 which was soaked in water got rusted. He submitted that if the delivery of the goods was taken by the plaintiff No.1 immediately after the same was retrieved from the sea, the damage would have been partial. In these circumstances, he submitted that for the lapse of plaintiff No.1, the liability cannot be fastened upon the defendant No.1.

14. It was further submitted that in the present case neither the negligence nor the failure on the part of the defendant No.1 to take proper care of the goods in their charge has been established. Assuming that the defendant No.1 is to be held liable then, he submitted that the same ought to have been restricted to the value of the machinery set out in the packing list originally forwarded by the plaintiff No.1. He submitted that in the revised packing list dated 18/10/1976 the foreign supplier had stated that the operator's desk machine was in fact packed in case No.28, but by mistake the same was not mentioned in the packing list originally forwarded. It was submitted that in the absence of any evidence to establish the same, the liability in respect of 'operator's desk' could not be fastened upon the defendant No.1 by relying upon the revised packing list. Accordingly, it was submitted that the judgment of the learned Single Judge which suffers from serious infirmities is liable to be quashed and set aside.

15. Mr.Kanuga, learned advocate appearing on behalf of plaintiff Nos.1 to 4 while supporting the Judgment of the learned Single Judge submitted that from the letter dated 30/8/1976 it is abundantly clear

that the plaintiff No.1 had directed the clearing agent to seek abatement/remission of duty under section 22/23 of the Customs Act. He submitted that even if the clearing agent had inadvertently used the word ‘abatement’ while seeking refund of customs duty, in fact there was no abandonment of goods. He submitted that since the goods contained in case No.28 were totally damaged on account of negligence on the part of the defendant No.1, the learned Single Judge was justified in passing a decree against the defendant No.1. Accordingly, the counsel submitted that there is no merit in the appeal and the same be dismissed with costs.

16. Having heard the rival contentions and on careful consideration of the evidence on record, we are of the opinion that there is no merit in the contentions raised by the Port Trust. In the present case, it is not in dispute that on discharge from the vessel, the defendant No.1 had taken charge of the 65 cases imported by the plaintiff No.1. It is also not in dispute that one case bearing No.28 out of the said 65 cases in the charge of defendant No.1 accidentally fell into the sea as a result whereof the machinery and the accessories contained in the said case No.28 were badly damaged and remained submerged in sea water

for two days. As per the survey report dated 25/10/1976 (Exhibit-J) carried out jointly with the surveyors of the Shipping Company, Bombay Port Trust and a B.P.T. Engineer, the machine contained in case No.28 was damaged beyond repairs and the same could not be used for its original intended purpose. No evidence has been led by the Port Trust to controvert the aforesaid joint survey report to which the Surveyors of the Port Trust were party. Under section 43 of the Major Port Trusts Act 1963 the responsibility of the Port Trust for the loss, destruction or deterioration of goods of which it had taken charge is that of a bailee under section 151, 152 and 161 of the Indian Contract Act 1872. In the present case, in the joint survey report it is clearly established that the machinery contained in case No.28 while in the charge of defendant No.1 were damaged beyond repairs and could not be used for its original intended purposes. Thus, virtual destruction or total deterioration of the goods is established. Since such destruction or deterioration has occurred while the goods were under the charge of defendant No.1, they cannot escape the liability.

17. The contention of the Port Trust that they had taken reasonable care and there was neither

negligence nor failure on their part in respect of the goods in their charge is without any merit. Noor Mohammed Sheikh, witness of the defendant No.1 in his cross-examination has stated that case No.28 put on trolley was extending outside by about half a foot on both sides. He has also admitted that the case No.28 was not tied to the trolley with a rope and if the same was tied with a rope there would have been better safety during transportation. He has also admitted that the case No.28 could have been placed in a bigger trolley for transportation. Use of a trolley which is smaller in size than the size of the case No.28 and the fact that the said case No.28 was not even tied to the trolley with a rope to avoid any impact due to jerk during transportation clearly constitutes gross negligence on the part of the Port Trust in handling the imported cargo in their custody. These were the minimum precautions which ought to have been taken by the Port Trust. However, no such precautionary measures were taken. In these circumstances, no fault can be found with the learned Single Judge in holding that the defendant No.1 Port Trust was guilty of negligence in not taking due care of the goods which were in its custody.

18. To get out of the liability for the damage

caused to the goods due to its negligence, it was contended on behalf of the defendant No.1 that in view of the plaintiff No.1 abandoning the goods under section 23 of the Customs Act there is relinquishment of title and on account of relinquishment of title the plaintiff No.1 could not claim any amount on the abandoned goods and consequently the plaintiff Nos.2, 3 & 4 who have stepped into the shoes of the plaintiff No.1 are also not entitled to claim any amount from the defendant No.1. There is no merit in this contention. Section 23 of the Customs Act deals with remission of duty on lost, destroyed or abandoned goods. The word 'abandoned' has not been defined under the Act. Section 23(1) provides for the remission of duty paid on goods which are lost or destroyed before clearance. Section 23(2) of the Customs Act provides that on relinquishment of title to the goods by the owner before clearance or while the same are deposited in a warehouse, the owner will not be required to pay customs duty on those goods.

19. In the present case, it cannot be said that the plaintiff No.1 has relinquished title to the goods because, firstly there is nothing on record to show that the plaintiff No.1 had intended to relinquish title to the goods. In fact, right from inception the

case of the plaintiff No.1 is that for the damage caused to the goods the defendant No.1 is liable. By its letter dated 30/8/1976 (Exhibit-E) the plaintiff No.1 had instructed the clearing agents to seek clearance of only 64 cases and to avail the facility of abatement/remission of duty paid on goods contained in case No.28. There was no instruction to abandon the goods. Secondly, even if the goods were abandoned, there is nothing on record to show that by abandoning the goods under the Customs Act, the plaintiff No.1 wanted to abandon their claim against the defendant No.1 for whose negligence the goods had to be abandoned. Thirdly, in the notice dated 27/5/1977 the defendant No.1 had stated that if the goods are not cleared by the plaintiff No.1 within 10 days of the receipt of the said notice, the goods in question will be sold in public auction as uncleared cargo. On the basis of the abandonment of goods, the customs authorities had passed an Order in Original on 27/8/1976 granting partial refund of duty to the plaintiff No.1. Thus, even after the order passed by the customs authorities the defendant No.1 had accepted that the title in the goods vested in plaintiff No.1 and accordingly by its letter dated 27/5/1977 the defendant No.1 had called upon the plaintiff No.1 to take delivery of goods. Therefore,

the contention that the plaintiff No.1 had relinquished the title is only an afterthought. In these circumstances, the finding given by the learned Single Judge that even after the abandonment the plaintiff No.1 continued to be the owner of the goods cannot be faulted.

20. The contention of the defendant No.1 that the revised packing list ought not to have been taken into account is also without any merit. In the revised packing list it was stated that 'operator's desk' machine was in fact packed in case No.28 but by mistake it was not mentioned in the original packing list. It is not the case of the defendant No.1 that the 'operator's desk' was not to be found in case No.28. If the case No.28 actually contained 'operator's desk' then, merely because it was by mistake not included in the original packing list, the defendant No.1 cannot take undue advantage of the mistake in the packing list. In fact the insurance companies have settled the claim of plaintiff No.1 by taking the value of operator's desk. Thus, the grievance of the defendant No.1 based on the packing list is also without any substance.

21. For all the aforesaid reasons, we find no

infirmity in the Judgment & order passed by the learned Single Judge.

22. Accordingly, the appeal fails and the same is dismissed with costs.

(R.M.LODHA, J.)

(J.P.DEVADHAR, J.)